DOCUMENT RESUME

ED 163 522 CS 502 234

AUTHOR Lujan, Philip D.
TITLE Communication Implications of the "Martinez" Case for the Santa Clara Pueblo.
PUB DATE Jul 78
NOTE 26p.; Paper presented at the Speech Communication Association Summer Conference on Intercultural Communication (Tampa, Florida, July 17-21, 1978)

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *American Indian Culture; American Indians; Civil Liberties; *Communication Problems; *Cultural Differences; Culture Conflict; *Federal Court Litigation; Legal Problems; *Supreme Court Litigation; Tribes
IDENTIFIERS *Indian Civil Rights Act; *Intercultural Communication

ABSTRACT

In "Martinez vs. Santa Clara," an Indian woman sought to overturn a tribal decision made by the Santa Clara Pueblo, in which tribal enrollment had been denied to her children. The case raised legal issues that are related to the Indian Civil Rights Act (ICRA) and to the relationship of the United States Constitution to tribal law. The ICRA, which deviates from the Constitution in some important respects related to cultural rights, was enacted with a concern for strengthening tribal governments and out of respect for tribal autonomy. However, the result of the act has been to pose more questions than it redresses. A major difficulty raised by the act is maintaining the rights of a group that has its own culture, tradition, and self-government within the boundaries of the United States. Sometimes, as in the Martinez case, tribes are unwilling to discuss underlying but secret issues in court. Although Indian tribal courts systems have improved in recent years, the amount of cultural diversity the American society will allow is still not clear, and though the Martinez case relieved a particular situation, questions have been left unanswered that will come before the courts in the future. (TJ)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED163522

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

"Communication Implications of the 'Martinez' Case for the Santa Clara Pueblo"

Presented at the SCA Summer Conference
on Intercultural Communication
July 17-21, 1978

University of South Florida
July 20, 1978

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Philip D. Lujan

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

Philip D. Lujan
Department of Communication
The University of Oklahoma

C5502 234

Communication Implications of the 'Martinez' Case for the Santa Clara Pueblo

Approaching intercultural communication concerns through a legalistic perspective is unorthodox. The conflict between Native Americans and the federal government, however, either originates or is resolved in legislation or the federal courts. Not even the conservative pueblos for all their isolation and disdain for change could effectively resist the growing involvement of the federal government. In this sense, the Martinez vs. Santa Clara[1] lawsuit provides an excellent opportunity to examine the survival attempts of Native Americans that have moved from the battlefields, through neglect, and finally to the higher abstraction of constitutional interpretation.

Six years of professional experience as a law student and as a staff attorney at the American Indian Law Center, University of New Mexico School of Law, as well as my family relationships, has afforded me an excellent opportunity to work intimately with the Pueblo people. During that time, the Martinez case became the focal point of the Pueblo frustration in coping with federal legislation. It is an excellent example of the infinite subtleties surrounding federal attempts to establish the legal framework within which tribal governments and cultures must operate. Indians, to the American society at large, are quaint when they dance and wear colorful costumes, but what if they choose to discriminate against females? The Martinez case was not a cautious case.

---

*Both authors are members of the faculty in the Department of Communication, University of Oklahoma. L. Brooks Hill (Ph.D., University of Illinois, 1968) is an Associate Professor. Phillip Lujan (J.D., University of New Mexico, 1974) is an Assistant Professor and Director of Native American Studies for the University.

The Pueblo's audacity, to fly in the face of current American thought, could not help but attract attention. It had all the earmarks of landmark litigation, yet it will be remembered as another esoteric Indian jurisdictional precedent, rather than a courageous statement of cultural diversity.

This discussion is organized into four major sections. The first is a historical background. The second is the Martinez case itself. The third, a brief explanation of the indian Civil Rights Act, and the fourth a preliminary examination of issues arising within the ICRA provisions.[2]

There is present a legal perspective and an implicit bias that cultural diversity is a desirable American attribute. In the future, the issues identified will be solidified and brought into focus through communication principles and theory. These initial attempts to identify legal cultural conflict represent an expression of a growing sense of frustration with the narrow and myopic approach to Native American concern inherent in the legal system. Hopefully, future expansion will further understanding on the part of the federal government and suggest strategies of survival for Native Americans.

Historical Background

The Santa Clara Pueblo, a Pueblo Indian Tribe, which was organized as a tribal government pursuant to the Indian Reorganization Act of 1934 (IRA). It functioned as an identifiable self-governing and soveriegn unit for approximately three hundred years prior to its reorganization under the IRA.

The Santa Clara reservation contains approximately 48,000 acres of land in north central New Mexico, the majority of which is not suitable for farming

because it is not amenable to irrigation. Santa Clara, having approximately 1200 members, is a medium sized Pueblo in relation to the eighteen others located in New Mexico. Aside from a period of Spanish Rule, the pueblo was governed in the traditional manner prior to the reorganization under the IRA. Traditionally there is no distinction between religious and secular matters. Pueblo governments have been characterized as theocracies. Ultimate leadership is provided by the "cacique," a religious leader who serves for life and whose decisions are final.

Traditional government organization was modified in the early 17th century with the arrival of the Spanish conquerors. The Pueblos, at the direction of the Spanish, instituted a secular government to deal with their conquerors. The Pueblo perceived this an an opportunity to direct Spanish attention away from the religious leaders, who continued to be the real authority in the pueblo. Governors, therefore, were appointed by the caciques to represent the Pueblo in its dealings with the Spanish. The governor's power was limited to secular matters and subject to the Caciques approval. The Spanish, not known as compassionate colonizers, attempted to eradicate Pueblo religion and replace it with Catholicism. The Pueblos countered by instituting an "above the ground" religion (Catholicism) paralleled by the preexisting "below the ground" religion (traditional pueblo). This "above/below" metaphor is a functional description of the relationship of church and kiva. The Pueblos took in the visible attributes of Catholicism, while they continued their traditional religious practices. This was the circumstance which created the legacy of secrecy presently surrounding the pueblo religion. Secrecy was necessary for Pueblo survival of the Spanish domination and has in subsequent times become a tenet of the Pueblo

religion. This bifurcated organization of the tribal government operated with reasonable success for many years. During the 1920's and 1930's, however, there arose a deep conflict between two factions of the tribe. The factions generally divided along the lines of those who favored strict adherence to traditional pueblo practices and those who favored a more progressive lifestyle. This factionalism is one of the most divisive forces on Indian reservations and is by no means limited to the pueblos.

At Santa Clara, this controversy expressed itself in the selection of a governor. The "progressives" felt the governor should be a young man, educated and capable of dealing effectively with non-pueblo culture. The "traditionalists" felt the governor should be an older, well respected man who knew the traditional customs and values of the pueblo. The dispute progressed until, literally, two governors had been instated. Each governor represented a faction that did not recognize the authority of the other. This governmental problem resulted in a compromise reorganization under the IRA. Santa Clara departed from a traditional unwritten constitution adopting a written constitution requiring election of the governor. The governor is charged with the responsibility of enforcing the civil and criminal law either written or unwritten of the pueblo. The governor is also empowered to settle disputes among the members and his decisions may be appealed to the pueblo through the council of elders whose power rests between that of the Cacique and the governor. All other secular governmental power and responsibility lies with the tribal council. The constitution specifically gives the council the power to determine which children of mixed marriages (member and non-member) will be recognized as members of the pueblo. In 1939, the council passed the membership

ordinance which was the eventual source of the Martinez law suit. The ordinance recognizes as members of the pueblo all children born of marriage between a Santa Clara male and a non-member. It does not recognize as members children born of a marriage between a female Santa Claran and a non-member. Superficially, the ordinance clearly is discriminatory against women of the society.

The Santa Clara Pueblo maintains that the ordinance is a written reflection of a pre-existing customary rule of membership and that it is essential to their cultural and religious existence. In testimony given at trial, the Tribe's witnesses agreed that the ordinance was a response to the increase of intermarriages within the Pueblo. The council was afraid that the limited resources of the Tribe would be dissipated among too many people. Although there were practical economic reasons for the ordinances adoption, the Tribe maintains the ordinance is consistent with prior custom.

Julia Martinez is a full-blooded, female member of Snata Clara Pueblo. While attending Santa Fe Indian School, she met and eventually married a full-blooded Navajo man named Myles Martinez. The couple moved to Santa Clara Pueblo and have lived there continuously since their marriage in 1941. They raised ten children in the pueblo of whom eight survived. The plaintiff in the case is their eldest daughter. Although the Martinez's have been seeking membership for years, the suit was instituted when the daughter was denied participation in a tribal housing project. All of the children were raised in the pueblo. They speak and understand Tewa, the traditional language of the pueblo. They are allowed to practice the traditional religion of the pueblo and have participated in ceremonies. Mrs. Martinez has been trying to enroll her children since 1946. Her attempts began with the Tribal council where she

was allowed to present her case. She and several other pueblo women similarly situated presented their children's enrollment problem to a special meeting of the entire pueblo. Their attempts brought no results. Mrs. Martinez then pursued her attempts outside the pueblo meeting with BIA officials, congressional representatives and interestingly with Senator Sam Ervin, Jr., himself. Senator Ervin, Jr., was the primary sponsor of the ICRA in congress. These outside attempts to gain membership also failed. Finally, in 1972 a suit was filed in federal district court for the district of New Mexico, seeking an injunction against the enforcement of the 1939 membership ordinance.

Mrs. Martinez's desire to have her children recognized as members of the pueblo is twofold. It is a psychological and social need which should not be underestimated. It also concerns substantial political and property rights. Recognition of Tribal membership would give the Martinez children three types of rights not now enjoyed. The first type is a political right to vote, petition the Tribal council and hold secular office. The second is a property right that would allow the children to participate in the land use rights of the mother's family. Although the Tribe owns land communally, families possess land use rights that they may devise, inherit or sell only to other members. The third right is an outgrowth of the second. Only members are allowed to live in the pueblo as a matter of right. As non-members, they would be subject to the power of Indian Tribes to exclude non-members from the reservation. While denied these tribal benefits, the Martinez children are not barred from participation in the general federal benefits of Indian ancestry. They also enjoy the option to be enrolled in the Navajo Tribe of which their father is a member.

Federal litigation - Legal issues

The primary thrust of Mrs. Martinez' challenge to the validity of the 1939 membership ordinance, alleges that the ordinance violates the equal protection and due process provisions of the Indian Civil Rights Act of 1968 (ICRA). Section 1302 (8) of the law, states that,

> No Indian Tribe in exercising powers of self-government shall - (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; . . . .

Two major issues emerge. The first questions the possibility that the ICRA effectively waives tribal sovereign immunity from federal suits and thus enables federal courts to examine the tribal membership ordinace. Secondly, assuming immunity is waived, what legal standard of equal protection should be applied to a tribal situation.

At the federal district court level, the court ruled that the ICRA waived immunity when coupled with another federal statute granting federal jurisdiction over actions brought under any Act of Congress providing Civil Rights protection. This implicit waiver of Tribal sovereign immunity was also sustained at the Court of Appeals level. It is interesting that neither of the lower courts directed attention to this issue. They rather summarily dismissed this issue because they had previously ruled affirmatively on the waiver. The Supreme Court chose this issue to dispose of the case without reaching the merits of the second issue. Both the district court and the Appeals court devoted considerable attention to the second issue, however, they reached opposite conclusions.

The federal district court, which decided in favor of the Tribe, examined

the 1939 statute in the light that the equal protection guarantees of the ICRA are not identical to the American Constitutional guarantee of equal protection. Instead the provision must be considered agianst the background of the Tribal sovereignty and interpreted within the context of Tribal law and custom! These two principles are not helpful in evaluating a particular circumstance. The efficacy of having a non-Indian federal judge reach a proper balance was a primary concern of the federal judge himself. The court finally concluded that the ICRA should not be construed,

> in a manner that would invalidate a tribal membership ordinance when the classification attached is one based on criteria that have been traditionally employed by the Tribe in considering membership questions.[3]

The courts came to this conclusion despite the following point of the plaintiff. The favoring of male lineage over female does not have a rational relationship to the strength of the parents identification with Santa Clara tradition. Many Indian people consider the following quote to be a lucid and realistic appraisal of the federal courts limitations in attempting to arbitrate Tribal matters. The court states

> ".....,the Indian Civil Rights Act should not be construed in a manner which would require or authorize this court to determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can

> best decide what values are important, but also because they must live with the decision every day. Obviously they can be and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct culture group."[4]

In contrast, the court of appeals applies a balancing test. It weighs the individual's right to fair treatment under the law and the importance of the Tribal interest in maintaining its antonomy and cultural integrity. It resolved the interpretation question by stating the fourteenth amendment standards developed for American law do not apply, but serve as a "persuasive guide." Thus the appeals court concluded that the merits of the case did not support a conclusion that tribal and cultural survival would suffer from enforcement of equal protection standards. The Tribe's interest was not compelling enough to overcome the individual's interest. Its primary rationale was the ordinance's recent vintage and its predication upon practical economic considerations. Thus, the appeals court reversed the district court and held in favor of Martinez.

This decision set the stage for the final confrontation in the Supreme Court. Each side having won one round, observers looked forward to a resolution of the central issue: What standards and criteria were proper in the interpretation of ICRA provisions. The interest generated by the case is apparent from the extensive number of Amicus Curiae briefs filed. A total of seven Amicus briefs were filed representing various Indian Tribes, organizations,

and the federal government. The American Civil Liberties Union filed a brief because of their interest in a sex discrimination case arising in rather exotic circumstances. Whether fortunate or not, the Supreme Court never reached the merits of the case. Instead, the Supreme Court chose to dismiss the case for lack of jurisdiction based on a lack of an explicit waiver of Tribal sovereign immunity. The Supreme Court rejected an implicit waiver of sovereign immunity argument, paying deference to the historical relationship between the federal government and Indian Tribes. This relationship places Tribes outside of the normal development of precedent in the federal courts, allowing implicit grants of Civil Rights jurisdiction. The issue was resolved in favor of the Tribe. It was a definite victory for Indian Tribes in their vital quest to gain recognition for powers of self-government. It was a disappointment however, to those who expected establishment of guidelines concerning the scope of application of constitutionally developed principles within a Tribal context.

ICRA

It is often a shock, when one is first exposed to the area of Indian Law, to learn that the Bill of Rights and the Fourteenth amendment do not apply to Tribal governments. This circumstance was first elaborated in the 1896 case of Talton vs. Mayes.[5] It held that the Cherokee nation's judicial authority had preceeded the United States and therefore was not bound by the restrictions of the fifth amendment. The Talton decision has since been losing vitality, but without clear standards for establishing which constitutional restrictions should apply to Tribal courts. Federal district courts are gradually becoming more likely to find some way to grant relief in a particularly bad situation.

Additionally, congress, the excutive and private interests, became increasingly concerned with the lack of the protections for Indian people which are considered fundamental to a free society. In the wave of enthusiasm accompanying the 1960's Civil Rights legislation, congress attempted to correct this apparent deficiency. Congress has the plenary power to legislate for Indian Tribes. Such legislation would be more effective than judicial doctrine and impervious to legal challenge. The resulting act's legislative history reflected a concern with the continued strengthening of Tribal governments and respect for Tribal autonomy.. It also recognized the abuses that had occurred in the area of Criminal law. Congress was aware of the possibility of the demoralization and ultimate destruction of Tribes through litigation. Thus congress rejected the notion of making the entire bill of rights applicable to tribal government.

There are some marked deviations from the Bill of Rights. Although the law incorporates the bulk of amendment one and amendments four through eight of the Bill of Rights, there are some interesting exceptions. These exceptions reflect the attempts by Congress to recognize unique economic, social conditions, including beliefs and customs, which might be jeopardized if the Bill of Rights, in toto, were applied to tribal organizations. Within the first amendment, the antiestablishment clause was omitted in deference to the theocratically organized Tribes, among whom the pueblos predominate. The right to counsel was guaranteed, but only at the individual's own expense. There is no right to indictment by a grand jury. There is also a limited right to a jury trial, upon request, consisting of six persons. A copy of this Act is included as appendix 1.

The ICRA is broad in scope. It covers all federally recognized Indian Tribes, Eskimos and Aleut Tribes, bands, Pueblos, communities, villages and

rancherias that retain self-governing functions. Additionally, all Tribal officials, Tribal chairmen, council member, judges, prosecutors, police and officials of special Tribal agencies, such as housing authorities and development corporations, are covered. It also establishes Tribal courts, whether traditional or non-traditional, either administered by the Tribe or by the BIA.

The final result of the Act has been to raise more questions than it resolves. Since its passage, practically every phase of Tribal government action has been reviewed. Cases instituted under the ICRA have included such questions as the exclusion of non-Indians from reservations, the suspension and banning of professional attorneys from Tribal court, the perception of excessive police force and excessive bail policies, Tribal enrollment, Tribal election disputes, and reapportionment of reservations to conform to the one-man, onevote principle.[6] The cases generated by the act have predominately been civil cases. Inherent in each lawsuit has been the question of what effects should the similarity of language in the ICRA and the Bill of Rights have upon interpretation in the Tribal context. Perpetually dissatisfied groups which are rivals for power often revel in attempts to disrupt the Tribal government. They hope to capitalize on the inherent mistakes or to paralyze through ICRA sanctioned litigation actions by the group in power. Horror stories concerning abuse of Tribal power abound. Of these abuse stories, many are true and are results of political motivation. People tend to gloss over the obvious corruption and abuse of power that occurs daily in federal, state and local governments, yet, those same people are often hypercritical of minor abuses or abuses in general perpetuated by Tribal officials.

In the public drafting process of the ICRA, the pueblos were consistently

the most adament opponents to its provisions. Since its passage, the pueblos have continuously had bills sponsored which would exempt them from the Act. This unsuccessful legislative effort has continued, but is apparently no longer necessary. The Supreme Court, at least for the moment, has ended this immediate external threat.

The source of the Pueblo's vigorous resistance to the ICRA provisions is the current lifestyle of the Pueblo people. The pueblos, including the Hopi, live a life that most resembles pre-Columbian Pueblo cultures.

The pueblos tribal self-concept supports the interpretation that their relative stability was the direct result of virtue and spiritual determination. It was however, primarily the result of Spanish rule and relatively slight population pressures. Fortunately for the Pueblo, the Spanish were content not to penetrate the guise of apparent adoption of Spanish secular organization and Catholicism. Additionally, the arrid southwest was considered by many to be a primitive and hostile environment. New Mexico grew slowly and the pueblos maintained a distant, but working relationship with the surrounding, predominately Spanish, communities. Beginning in WW II the general population of New Mexico began to rapidly increase. Later, the perceived energy crisis added impetus to the southwest's population growth.

Two of the pueblos are located on the immediate north and south boundaries of Albuquerque; Sandia Pueblo on the north and Isleta on the south. These pueblos show the greatest effect of the urban and non-Indian contacts. Those Pueblos working in Albuquerque permanently, and those returning to the reservation are creating the greatest impetus for change. They are exposed to the contemporary American worldview and are relatively sophisticated in urban

lifestyle. Even in the traditionally conservative pueblos north of Albuquerque, citizen groups informally organized are pressuring Tribal councils to make swifter adjustments in pueblo life to accomodate rising social expectations. They are by no means a majority, but their growing number reflects this undercurrent of change. Despite a lengthy history of colonial domination the pueblos have largely maintained their traditional lifestyles. The culture is dynamic in that its expansive worldview allows for incorporation of innovation, but changes in the structure of pueblo lifestyle have always been made grudgingly. The Spanish brought the development of secular government and secrecy to the religion. It is understandable that the pueblos still cherish this notion of secrecy as the key to their future survival.

Throughout the Martinez testimony and in the trial briefs there are only superficial references to the religious connotations of the male-superiority membership ordinance. This issue was ignored because the Santa Clara Tribal council had demanded of their lawyers that there be no testimony concerning the issue of religion. In interview with the Governor of Santa Clara, the honorable Paul Tafoya, the importance of secrecy was clarified.[7] Governor Tafoya explained the intense anxiety which his testimony at the trial caused him. He was under direct orders from the Tribal council, who were present at the trial, not to discuss any of the religious implications of the ordinance. The pueblo penalty for divulgence of religious secrets is death. It is impossible to assess the real threat of death, but at the very least Governor Tafoya, and every other Pueblo witness, had at stake their future in the pueblo. This secrecy tenet created the anomaly of having a non-Indian, anthropologist Florence Hawley Ellis, testify about the Santa Clara social structures, concerning the attributes of patrilineal characteristics.[8] She was very circumspect and superficial in her testimony. It is probable her circumspection was

necessary to maintain her good relationship with the pueblos. The brief prepared by Mrs. Martinez' lawyers made much of the fact that Dr. Ellis had given contradictory testimony. Dr. Ellis' testimony wavers between ascribing patrilineal and then bilateral kinship characteristics to Santa Clara. Dr. Ellis has spent her life studying the Pueblos and it seems unlikely she would be confused. Rather, it reflects a reluctance to pursue the matter beyond a certain prescribed point. This would not jeopardize future study and would expose only what had previously been printed. At trial this was a dangerous strategy. Not surprisingly, the district court expressly found that the ordinance did not bear any relationship to religion. The Pueblos themselves mentioned the religion basis, but would not discuss it. Similarly, the Appeals court was critical of what it considered to be an ordinance of recent vintage and economically motivated. The Court of Appeals might have found in favor of the Pueblos if there was a full record of testimony on the religious issue in that the notion of religious freedom would have been the best possible defense. Thus the Pueblo lawyers and the Amicus briefs devoted much energy to the sovereign immunity issue. This was the best second choice given the constraints initiated by the pueblos themselves. Thus the record on the religious defense of the ordinance was weak. Fortunately, the Supreme Court decided to use the sovereign immunity issue to dispose of the case.

The Supreme Court's decision seems to forestall the kind of dilemna created for Indian tribes seeking to vindicate Tribal custom in an alien environment. The decision represents an expressed recognition of the congressional desire to insulate Tribal action from judicial scrutiny and an implicit recognition of the inability of courts to contend with intratribal disputes. It is one thing

for a federal court to review a criminal proceeding which organically corresponds to the American society. This propriety is reflected in the habeaus corpus provision of the ICRA. It is an entirely different matter to review civil matters that may be rooted in the obscure traditional beliefs or customs of another culture.

The pueblos committed themselves to a course of action that was consistent with their religious beliefs, but was not expedient in the predominant, legal sense. They chose knowingly to play the litigation game with a handicap. This decision itself vividly exemplifies the problems of imposing one philosophical legal system upon another, culturally distant.

Had the Supreme Court ruled against the pueblo, the court would have the Tribe to abandon the ordinance and enroll the Martinez children. In further discussions, the Pueblo governor revealed that the Tribal council had already discussed the possibility of losing the lawsuit. After a long discussion the council of elders had decided they would not obey such an order. They knew that such defiance might result in jail sentences for contempt. The elders were prepared to accept jail rather than give up the ordinance that was characterized by the lower federal courts as having "no relation" to religion. The governor presumed that in the absence of the Tribal council, the BIA sould step in and run the government. It would be a sad day for Santa Clara, but the council saw no alternative. It could have happened. The legal mechanisms were all in place for just such an occurance.

It is apparent the pueblos are not prepared to abandon their adherance to secrecy even when it may interfere with their chance of successfully completing a litigation struggle. The Supreme Court decision has merely postponed

the possible bad consequences of the ICRA. It is clear from the decision that the Supreme Court has placed the burden of determining whether an infraction of civil rights has occurred on both the Tribal court system itself and on the BIA. There is still no resolution of what the Anglo-American concepts of "equal protection" and "due process" mean within the context of Tribal law and society.

Concerning the BIA, there is already an established administrative review procedure existing in many Tribal constitutions. These provisions allow the assistant secretary to review Tribal decision. In such cases, Indian Tribes will be scrutinized on the basis of the requirements of the ICRA; requirements and standards yet to be developed. The BIA is administratively placed within the Department of Interior. The Department of Interior, as well as other federal administrative agencies, seek legal advice from the Solicitor General's office. The Amicus brief for the United States is instructive and cause for Tribal concern. The United States brief agreed with plaintiff, Mrs. Martinez, that the federal courts did have implicit judisdiction under the ICRA. The brief also stated that the ICRA interpretation should respect the need to preserve Tribal culture, tradition and self-government. However, the United States brief then agreed with the Appeals Court that the discrimination against female members and their children could not be justified on any substantial or rational relationship to the identified Tribal interests. These are the traditional Anglo-American legal criteria for evaluating issues that concern equal protection. It can be assumed that if the merits of the Santa Clara case were subject to administrative review, the ordinance would have been struck down. The issue would probably be appealed once again to the federal courts

with the Tribe suing the federal government through the Department of the Interior. Ultimately nothing would have resolved concerning the question of what the ICRA means. Ironically, Santa Clara's constitution has no administrative review provision.

In the instance of Tribes without an administrative review process, the question of what the ICRA means is also still open. Tribal courts have been upgraded considerably within the last decade. An optimistic viewpoint would emphasize the fact that Tribal courts have been placed in a unique position of fashioning their own definitions of "equal protection" and "due process." Each will be able to develop an "Indian Common Law" that is expressive of the traditional Tribal values. Since each tribe is unique there exists the possibility that there will be as many definitions as there are there are tribal court systems. Whether this much diversity will be tolerated remains to be seen. The development of a local Indian Common Law surrounding the ICRA is the best way to insure that the Act has the minimal effect on Tribal autonomy. Compromises will have to be made, yet it will be Tribal courts that will fashion those compromises. Then, too, many Tribal constitutions do not have provisions granting Tribal courts judicial review of Tribal council action. Similarly, many Tribal constitutions do not have an independent judiciary. The judge is hired and can be fired by the Tribal council. This will act as a constraint on Tribal judicial action. These are matters easily dealt with by constitutional revision, but revision represents a shift away from the traditional power of the Tribal council. The Pueblos Tribal Councils have a judicial/legislative/executive function. There is no clear cut distinction between these different functions. Even though the Supreme Court disdains the attempt to unnecessarily

affects Tribal self-governments, the implications of the ICRA as it searches for definition and implementation might ultimately necessitate fundamental Tribal reorganization.

Although Tribal courts are receiving more training, the training that they are receiving is administered by professional attorneys or those steeped in Anglo-American legal traditions. There cannot help but be a reflection of this bias in the attitude of the trainers and eventually in the trainees. This may be an inevitable result of the necessity of developing Tribal courts. But if the tribes are at least aware of the danger perhaps thay can modify its effects. Similarly, many Indian Tribal judges feel that somehow they and their courts are inferior to analogous state courts. This feeling of inferiority is often translated into uncritical wholesale adoption and imitation of state court procedures and techniques. It is a tragedy that tribes are often prompted into adoption of law and order codes that are essentially complex state codes with the tribe's name inserted where the state's name formerly appeared. The Indian constituents often do not understand the code and judges are faced with difficult statutory constitution problems. The temptation of "me too-ism" for Tribal courts will be given added impetus by the recent Martinez decision.

The ICRA's provision allowing the presence of counsel has created an influx of professional attorneys into Tribal courts. The professional attorneys almost never have an appreciation of the Tribal culture or laws. A courtroom is a familiar place for them and they display the behavior and thought patterns habitually formed in non-Indian courtrooms. Disregarding their disruptive effects of intimidation of witnesses insecure in the English language, the greatest potential for harm lies with the Tribal judge's human tendency to

desire the respect and appreciation of the professional attorney. Thus Tribal judges are under greater pressure to imitate their state counterparts. A few tribes are developing Tribal bar associations. This promotes understanding of Tribal laws but it is an adoption of a non-Indian solution to the problem.

An Interesting question arises in relation to the extent the ICRA will be interpreted even within the Tribal contextual constitution. Several pueblos offer an option to defendants. They may choose to be prosecuted under recently adopted and formalized law and order codes or under traditional law. Not many choose the traditional law because the penalties are more severe. Traditional punishments have not been tested under the "cruel and unusual punishment" provision of the ICRA. The pueblos traditionally used public floggings as one form of punishment.[9] Another perspective question is; would the election of the individual for traditional punishment waive the ICRA requirements or is their waiver possible? While working at the Indian Law Center in Albuquerque, New Mexico, this writer heard several substantial rumors concerning public floggings that had occurred on certain pueblos. No doubt the Tribal court that imposed such a sentence will not be able to review their own action. This, then, raises the final question. Who will be the ultimate reviewer; the Tribal council, the BIA or the federal courts?

The question for Tribal governments and Indian cultures in general has always been how much cultural diversity will the American society allow? The The congress and the federal court system are the official arbitors of this type policy dicision. The ICRA was an attempt to establish some boundaries of power for tribal governments where previously none were perceived to exist. Unfortunately, this piece of legislation as well as the Martinez case have only added

to the confusion. The Supreme Court, which could have done something of significance, chose to avoid the real issue. Instead, it characteristically took a procedurally abstract way out which, in fact, begged the merits of the case. This ambiguous decision came after six years of anxiety and anticipation by not only Santa Clara, but Indian tribes all over the United States. The ICRA remains a cause of concern for Indian people. The proper circumstances shall most certainly occur which will probe the questions left unanswered by the Supreme Court. This will necessarily involve more costly and ponderous litigation, with the distinct possibility that the real issues will once again be ducked. The Santa Clara victory in the Supreme Court is without substance although it gives immediate relief to a particular question. A look at the historical patchwork attempts of congress to cope with the "Indian problem" also causes concern. Historically, Indian legal victories have been followed by legislative attempts to "correct" the situation. Obviously, the Martinez decision will prompt a new clamor in congress. Shocked liberals and friends of the Indians will demand rectification of the shocking premise that Indians have no federal review of Tribal decisions. Unfortunately no one will question the underlying assumptions that support a system rife with the necessity of procedural protections from preordained abuse of power.

Indian tribes have always been considered expediencies whose transitional nature mark them as "junior" governments not, it is implied, really capable of making important decisions. It can be readily seen that it will be difficult for Indian tribes to develop if they are not allowed to make their own progressive mistakes. Their mistakes are an inevitable consequence of Tribal government attempting to cope with the incorporation of alien beliefs and presumptions.

The federal government has persistently sought to impose its position of legal rights onto a pre-existing social structure. This approach to breaching the social and legal gap between American and Pueblo societies has never worked and it is unlikely that so naive a plan could ever work. The subtleties and consequences of the Tribal struggle for survival transcends both congressional "cookbook" solutions and neo-romantic notions of "Indianism."

RIGHTS OF INDIANS, 25 U.S.C. §§1302-03 (supp. 1971)

§ 1302. Constitutional Rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

FOOTNOTES

[1]Martinez vs. Santa Clara, 402 F. Supp. 5 (NM 1975), Martinez Vs. Santa Clara, 540 F.2d 1039 (1976), Santa Clara vs. Martinez, 46 LW 4412.

[2]Act of April 11, 1968, Pub.L. No. 90-284, 202, 82 Stat.77, 25 USC 1302(1970).

[3]Martinez vs. Santa Clara, 402 F. Supp. 5, 9, (NM 1975).

[4]Martinez vs. Santa Clara, 402 F. Supp. 5, 10, (NM 1975).

[5]Talton vs. Mayes, 163 U.S. 376.

[6]Dodge vs. Nakai, 298 F. Supp. 26 (D. Ariz. 1969); Reagan vs. Blackfeet Tribal Court, Civil No. 2850, (D. Mont. 1969); Longcassion vs. Leekity, 334 F. Supp. 370 (D. NM 1971); Pinnow vs. Shoshone Tribal Council, 453 F.2d 278 (1971); Luxon vs. Rosebud Sioux Tribe, 455 F2d 698 (8th Cir. 1972); Soloman vs. LaRose, 335 F. Supp. 715 (D. Neb. 1971); Brown vs. United States, Civil No. 72-3024 (D. SD 1973).

[7]The interviews with Governor Tafoya over a period of several days when the author and Governor Tafoya worked on a National Tribal Court Judges Association project in May of 1976.

[8]Dr. Florence Hawley Ellis, Professor Emeritus of Anthropology, University of New Mexico.

[9]Appellants opening brief, United States Court of Appeals Tenth Circuit, No. 75-1615, October, 1975, at pg. 27.